

STATE OF MICHIGAN
IN THE SUPREME COURT

(On Appeal From the Michigan Court of Appeals)

RALPH ORMSBY and KIMBERLY ORMSBY,

Plaintiffs-Appellees,

vs.

CAPITAL WELDING, INC., an Ohio
Corporation, and MONARCH BUILDING
SERVICES, INC., an Ohio corporation,

Defendants-Appellants.

Supreme Court Nos. 123287; 123289

Court of Appeals No. 233563
(Hon. Kirsten F. Kelly;
Kathleen Jansen; Pat M. Donofrio)

Oakland Circuit No. 98-008608-NO
Hon. Alice L. Gilbert

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PLAINTIFFS-APPELLEES' BRIEF ON APPEAL

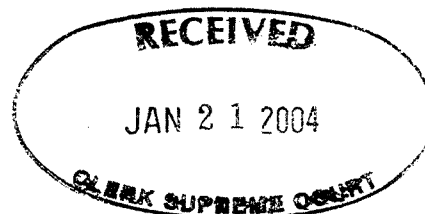


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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT THE RETAINED CONTROL EXCEPTION POSES A SEPARATE, DISCRETE INDEPENDENT BASIS OF LIABILITY UNDER ESTABLISHED MICHIGAN LAW, AND THAT A GENUINE ISSUE OF MATERIAL FACT REMAINS WHETHER CAPITAL WELDING IS SUBJECT TO LIABILITY UNDER THE EXCEPTION IN THIS CASE?

Plaintiffs and the Court of Appeals answer, “YES”.

Defendant, Capital Welding, and the Circuit Court answer, “NO”.

- II. DOES THE COURT OF APPEALS’ DECISION ALSO REPRESENT A CORRECT APPLICATION OF THE COMMON WORK AREA THEORY, AGAINST THE DEFENDANT GENERAL CONTRACTOR, MONARCH; OR AT LEAST A REASONABLE TRIER OF FACT COULD SO CONCLUDE?

Plaintiffs and the Court of Appeals answer, “YES”.

Defendants-Appellants and the Circuit Court answer, “NO”.

- III. DID THE COURT OF APPEALS APPLY THE “COMMON WORK AREA” THEORY TO A NON-GENERAL CONTRACTOR?

Plaintiffs and the Court of Appeals answer, “NO”.

Defendants-Appellant, Capital Welding answers, “YES”.

COUNTER-STATEMENT OF THE CASE

This is a construction site accident case. Mr. Ormsby (Plaintiff) “was severely injured” on April 24, 1998, in the course and scope of his employment as a journeyman ironworker (employed by “Abray”), when steel on which he was standing collapsed, suddenly and without warning, throwing him to the ground 18 feet below (Third Amended Complaint filed: 12/22/98, p. 3, ¶ 8; Appx. 3b). The project was the construction of a Rite-Aid store. The Defendants include the general contractor (Monarch Building Services) and Capital Welding, Inc., a company retained to complete the steel erection work on the building, but which subcontracted the actual steel erection to Plaintiff’s employer, Abray (see: Third Amended Complaint filed: 12/22/98, pp. 1-3; Appx. 1b-3b). Plaintiff asserted negligence theories against both Monarch and Capital Welding, and that the work in which he was engaged was “inherently dangerous” (Third Amended Complaint; 12/22/98, pp. 3-5; Appx. 3b-5b). More particularly, Plaintiff alleges Defendants were negligent in “acquiesce[ing] in unsafe construction activities including but not limited to loading unwelded bar joists with bundles of steel decking” (*Id.*; Appx. 4b; ¶ 13[a][vi]). In the accident, Mr. Ormsby suffered “fractures to both risks and arms, facial lacerations, surgical scarring, neurological injuries,” and a back injury. (Appx. 6b; ¶ 17).

Capital Welding moved for summary disposition on February 22, 2000 (C.W. Appx. 448a).¹ Plaintiff responded, and filed a Brief and supporting exhibits, on August 1, 2000 (C.W. Appx. 1a).. Having taken the motion under advisement at an August 30, 2000 hearing, the Circuit Court granted summary disposition to Capital Welding in an Opinion and Order of September 19, 2000 (C.W. Appx. 547a-550a), concluding:

1. The Third Amended Complaint fails to include an allegation that the accident occurred in a common work area;

¹ “C.W. Appx.” signifies Capital Welding’s “Appellant’s Appendix.” “Mon. Appx.” refers to “Defendant-Appellant Monarch Building Services, Inc.’s Appendix.”

2. "There is no evidence that other subcontractors would work on the erection of the steel structure", so that there was insufficient evidence to support the notion that this was a common work area anyway;
3. The "retained control" theory applies only in situations involving "common work areas." Citing, Candelaria v BC General Contractors, 236 Mich App 67 (1999);
4. There was no retained control on Capital Welding's part, in any event, Plaintiff's retained control theory being "predicated", in the Circuit Court's view, "upon various contractual provisions contained within the contract between Rite-Aid [the owner] and Monarch, and the subcontract between Monarch and Capital."
5. There is "no evidence" to support the inherently dangerous activity theory, since this was nothing "other than a routine construction job."

(Opinion and Order of 9/19/00, pp. 2-3; C.W. Appx. 548a-549a).

Monarch filed its Motion for Summary Disposition on December 1, 2000, to which Plaintiffs responded with a Brief and Exhibits (filed: 2/7/01; C.W. Appx. 2a). At the same time, Plaintiffs moved to amend their Complaint to include a specific allegation that the accident had occurred in a "common work area." (C.W. Appx. 1a). The motions came before the Circuit Court on March 7, 2001. The Circuit Court denied the Motion to Amend, finding it to be futile under the analysis the Circuit Court had embraced in the S.D. Opinion as to Defendant Capital Welding (TR., 3/7/01, p. 7; Appx. 45b). The Court took the summary disposition motion under advisement. Id., 19 (Appx. 57b).

Twelve days later, the Circuit Court issued a two-paragraph "Opinion and Order", granting summary disposition to Defendant Monarch, on the ground that the "present motion [was] based specifically upon the issues previously addressed by the Court in the Opinion and Order dated September 19, 2000," granting summary disposition to Capital Welding (Opinion and Order of 3/19/01; C.W. Appx. 553a).

The Court of Appeals reversed the Circuit Court's grant of summary disposition, in significant part, concluding that genuine issues of material fact remain whether: (1) Capital Welding has potential liability under a "retained control" theory; and (2) the general contractor, Capital Monarch, has potential liability under the "common work area" principle (Court of Appeals No. 233563; publ'd: 1/24/03; C.W. Appx. 555a, et. seq.). In the course of its published, unanimous opinion, 255 Mich App 165 (2003), the Court stated the general rule that "the employer of an independent contractor is not liable for harm caused to another by the subcontractor or its servants," and the rule's exceptions, including "retained control", "common work area" and "inherently dangerously" activity (C.W. Appx. 558a-560a). The Court further concluded that the common work area and retained control principles represent "two separate exceptions" to the general rule of nonliability (C.W. Appx. 560a). Engaging in an extensive discussion of Michigan precedent in this field, the Court concluded that "because the two exceptions derived from two different reasons for abrogating the general rule of employer nonliability, it is appropriate to apply them as separate exceptions" (C.W. Appx. 562a).

On November 6, 2003, this Court granted leave to appeal, "limited to the issue whether the retained control doctrine and the common work area are separate and the scope of application of the doctrine(s)" (Mon. Appx. 201a-202a). 469 Mich 947 (2003).

COUNTER-STATEMENT OF FACTS

Mr. Ormsby, a 45-year-old journeyman ironworker employed by Abray Steel Erectors, fell eighteen feet and was seriously injured at a Rite-Aid construction site in Troy, Michigan on April 24, 1998 (Third Amended Complaint, p. 3, ¶ 8; Appx. 3b). He was part of a crew detailing iron spacing and welding open web joists on the roof of a new store. (Plaintiff's dep, 31-37; C.W. Appx. 33a-39a). The crew which had erected the structural steel (not Plaintiff's crew) had

placed the joists on the roof, but had also improperly loaded unwelded joists with thousands of pounds of metal decking and steel angle. As Plaintiff attempted to straighten the joists, the entire webbed steel structure collapsed, throwing him to the ground. (C.W. Appx. 33a-39a; 46a-47a).

The general contractor was Defendant, Monarch Building Services, Inc. (Rite-Aid/Monarch contract; Appx. 9b). Defendant, Capital Welding, was the steel erection subcontractor which basically sub-subcontracted the work to Plaintiff's employer, Abray, issuing a purchase order to Abray Steel (Appx. 31b). This purchase order consists of one page, there being no document specifying Abray's safety responsibilities. Id.

H.E. Robinson is an ironworker who owns Capital Welding. He testified that the contract provided that Capital Welding was supposed to keep the building adequately braced until the structural steel was all tied in (Robinson dep, 41; Appx. 37b). He did not feel it was necessary to discuss safety with Abray Steel (Appx. 34b; Robinson dep, 31). There was a serious personal injury accident the day before Mr. Ormsby's injury, involving another Abray ironworker. Id., 18 (Appx. 33b). Each bundle of decking on the unwelded bar joists weighed close to 4,000 pounds (Appx. 36b). He "absolutely" agrees that such ironwork is inherently dangerous. Id., 49. Discovery of whether pieces of iron were welded would not "take a real complicated inspection." Id., 74 (Appx. 38b).

Capital Welding's field representative, Alex Stadler, also recognized that such steel erection work is inherently dangerous in character (C.W. Appx. 343a).

Capital Welding's subcontract with Monarch (Response to Capital Welding's S.D. Motion; 8/1/00, Exh. B; Appx. 19b) required Capital Welding to take total responsibility for the steel erection procedures and job site safety matters. Under the heading, "Safety Precautions and Procedures," the subcontract provides:

“4.3.1. The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons or property in accordance with the requirements of the Prime Contract.” [Appx. 22b].

Mr. Redding, Monarch’s on-site superintendent, testified at his deposition as follows:

1. Capital Welding hired Abray to erect the steel, but such hiring did not absolve Capital of its responsibility for safe practices (C.W. Appx. 291a);
2. Another injury-causing accident which occurred the day before Mr. Ormsby’s incident caused Redding some concern about the way the building was being erected (C.W. Appx. 230a);
3. As Monarch’s construction superintendent, Redding looked to Capital Welding for all aspects of the fabrication and erection of the structure -- not Abray (C.W. Appx. 239a);
4. Redding looked to Capital Welding to supervise the means, methods, techniques, sequences and procedures for erecting the steel (C.W. Appx. 240a);
5. Redding contacted Capital Welding after the first accident because he felt that the accident was Capital Welding’s responsibility (C.W. Appx. 254a);
6. Redding had safety concerns about Capital Welding’s ability to get the job done in the time that they had allotted for it (C.W. Appx. 273a).

Alex Stadler was Capital Welding’s field superintendent. Stadler stated at deposition:

1. That he would go out to this job and troubleshoot and “that if there’s a problem, that kind of thing, that’s the reason that I was out there” (C.W. Appx. 322a);
2. Stadler was there when the other accident occurred (C.W. Appx. 327a);
3. Capital Welding had sufficient knowledge, between himself and its owner, Mr. Robinson, to erect a building safely; Stadler was aware of all relevant industry standards (C.W. Appx. 331a);
4. No document absolved Capital Welding of its safety responsibilities (C.W. Appx. 342a);

5. Capital Welding had the authority to throw a contractor off the site for safety reasons (C.W. Appx. 344a);
6. If Stadler felt a crane operator's presence was needed at the site he would call Don Abray and tell him to get the crane there (C.W. Appx. 361a);
7. Mr. Stadler admitted that he instructed ironworkers with regard to steel fabrication errors and the correction thereof (C.W. Appx. 327a-328a).

The Monarch/Capital Welding subcontract required that Capital Welding "assume toward the contractor all obligations and responsibilities which the Contractor, under the Prime Contract, assumes toward the Owner and the Architect" (Exh. B to Response to Capital Welding's S.D. Motion; 8/1/00, Article II, § 2.1; Appx. 20b). These included the specific obligation not to load or to permit any part of the work to be loaded so as to endanger its safety (Id., ¶ L[7], p. 8; Appx. 14b).

Mr. Ormsby was born in December of 1954, and after working for several years as a laborer in the construction industry, joined the ironworker apprenticeship program, ultimately becoming a journeyman (C.W. Appx. 6a, 16a-19a). He had never before seen a structure collapse as it did on the day of his accident (C.W. Appx. 23a). Abray had no designated safety man of its own (C.W. Appx. 28a). When he came to the job site on the day of the accident, the joists were unwelded (C.W. Appx. 33a-35a). Typically, the joists would be bolted together (C.W. Appx. 36a). Instead, they had to be clamped -- a procedure which Mr. Ormsby had never seen before. Id. While they were clamped, the decking was loaded on top of the joists (C.W. Appx. 33a, 37a). In addition, the tie joists were supposed to have lugs on their columns, but did not. Id. "The fabricator had not welded the lugs onto those columns." Id. The superintendent (Stadler, from Capital Welding) told Mr. Ormsby to fabricate lugs out of a piece of angle iron and weld them onto the columns so that "the columns can be made to go plumb." (C.W. Appx. 37a-38a). Mr. Ormsby had seen Stadler previously on the job site, the day before, which was

Ormsby's first day on the job (C.W. Appx. 33a, 80a). In Mr. Ormsby's words, "he told me what I needed to do to, you know, rectify the problem." Id. The discussion went beyond the lug issue:

Q: Okay. Tell me about the discussion that you had with this fellow on the 23rd.

A: Oh, it was basic things about, I mean, there was some problems on the lease side, too. Like, for instance, when they ordered the joists, one of the joists for whatever the reason was, ended up being like so many feet short, like twenty feet short or whatever ... and there was some -- there was some other columns that came up underneath to hold windows or something in between where the lugs were on the columns on the beam and the anchor bolts and the footing, something was off.

Q: Is it fair to -- is it accurate to describe your discussions with this superintendent that if you encounter a problem, you were talking to him about how to rectify the problem?

A: Oh, yes. Yes. [C.W. Appx. 81a-82a].

Mr. Ormsby further testified that "if the superintendent on the job tells you they want something done, then you're pretty much obligated to do that really." Id. In some situations, he was required to "do whatever the superintendent wants." Id. It is not true that he would never take direction with regard to the methods of his work from a superintendent who is not an ironworker (C.W. Appx. 83a-84a).

Immediately prior to the collapse of the structure, Ormsby was straightening joists with an "eight pound beater." (C.W. Appx. 45a-46a). He was positioned on top of the decking previously loaded on the joists (C.W. Appx. 46a-47a). He "turned around and start[ed] walking towards the beam line and shooo, it all went out from under my feet." Id. Another ironworker, Clarence Grant, fell also. Id.

Plaintiff further testified that there was a masonry worker "right below us" while he was working on this structural steel, an individual employed by another contractor (C.W. Appx. 54a-

55a). Ormsby further recalled discussions with the superintendent concerning scheduling, with Redding telling him "that they wanted the Rite-Aid side done first because there was going -- the other side was a lease side and the other side was Rite-Aid side and, you know, they wanted Rite-Aid to be able to get moved in there." (C.W. Appx. 92a-93a). When the parts of the structure did not fit together the way they were supposed to, based on the drawings, Ormsby brought it to the attention of the superintendent, who "told me what to do." (C.W. Appx. 93a-94a). Ormsby considered the conversation with the superintendent (Stadler) concerning the angle and the fabrication of the lugs to be a direct order along the lines of "this is what I want you to do to fix the problem." (C.W. Appx. 94a). Mr. Ormsby's crew did not set the decking on the joists (C.W. Appx. 96a).

Mr. Mendenhall, a Monarch supervisor, conceded that other contractors had worked in the same area where Plaintiff fell, and would be working there thereafter, of necessity, in order to complete the building (C.W. Appx. 182a-186a).

ARGUMENT

INTRODUCTION/STANDARDS OF REVIEW

This Court has granted leave to appeal, limited to the issues whether the common work area and retained control principles pose separate, independent exceptions to the general rule that an employer of an independent contractor is not liable for the contractor's negligence or that of the contractor's employees; and the extent of application of those doctrines (Monarch Appx. 201a-202a). This Brief will establish that the Court of Appeals was correct in concluding, based on the intrinsic nature of the two exceptions, that they are separate, independent exceptions to the general rule of nonliability. Secondly, Plaintiffs respectfully submit, the Court of Appeals' application of those exceptions to these Defendants-Appellants was correct, on the facts of this case. Defendants' arguments to the contrary lack merit.

More generally, this Court's precedents in this field have withstood the test of time, and remain fully justified by general negligence principles, and by the workplace safety rationale which underlies those decisions. Those decisions do no more than place responsibility where it belongs, upon the party occupying the best position to exercise such responsibility, and those actually in control of construction sites. Defendants have offered no indication that this workplace safety rationale no longer has a place in our State, insofar as the actual working relationships of owners, general contractors, and subcontractors are concerned. The only confusion in the field (contrary to the Briefs filed by Defendants and their amici) was wrought by the errant, incorrect "blurring" of the retained control and common work area exceptions, by the Court of Appeals in Candelaria v BC General Contractors, 236 Mich App 67 (1999) (see, Monarch's Brief, at p. 16). Far from constituting reversible error, the Court of Appeals' published treatment of these issues represents a welcome clarification of the jurisprudence in this area, and is consistent with this Court's decisions.

Defendants, and their friends, cannot deny that the concerns which produced Funk v General Motors, 392 Mich 91 (1974) are still relevant and urgent. Mr. Ormsby, and his crew, are faced with the same “ultimatum” identified for the Court by Justice Ryan in Hardy v Monsanto Enviro-Chem, 414 Mich 29, 41 (1982), to-wit: “[i]f you don’t want to work ^up in the steel, go home.” Quoting, Funk, supra, 392 Mich at p. 113. At the same time, that worker’s employer has an insufficient workplace safety incentive, given the availability of the exclusive remedy defense to any tort claim, and the near-impossibility of fitting the intentional tort exception to that workers’ compensation exclusivity. See, MCLA 418.131(1); Travis v Dreis & Krump Mfg., 453 Mich 149 (1996).

It is just as true today, as it was 30 years ago, that placement of “ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.” Funk, 392 Mich 91, 104.

The appellate courts review decisions on motions for summary dispositions de novo. Pippin v Atallah, 245 Mich App 136, 141 (2001); Crown Technology Park v D&N Bank, 242 Mich App 538, 546 (2000). Therefore, like the Circuit Court, they consider all of the available documentary proofs “to determine whether a genuine issue of material fact exists to warrant a trial,” while drawing all reasonable inferences in Plaintiffs’ favor. Pippin, at 141; Kubisz v Cadillac Gage, 236 Mich App 629, 633 (1999) (non-movant obtains the benefit “of any reasonable doubt”); Wallad v Access BIDCO, 236 Mich App 303, 312 (1999). “Critically, the

court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition.” Morris v Allstate Insurance Co., 230 Mich App 361, 364 (1998).

The Court of Appeals correctly determined that the Circuit Judge had erroneously granted summary disposition in dismissing Plaintiffs’ retained control theory against Defendant, Capital Welding; as well as Plaintiffs’ “common work area” claim against the general contractor, Defendant, Monarch Building Services. Genuine issues of material fact remain with regard to the merits of each of those theories.

The Circuit Court also denied leave to amend to include a specific allegation that the site of Plaintiff’s accident is a “common work area”. The Court of Appeals reviewed this ruling for an abuse of discretion, while mindful that leave to amend should only be denied for particularized reasons, Horn v Dept. of Corrections, 216 Mich App 58, 65 (1996), and that leave to amend should be freely given when justice so requires. Dampier v Wayne County, 233 Mich App 714, 721 (1999); MCR 2.118(A)(2). Because amendment of the Complaint would not have been futile, the denial of Plaintiffs’ motion was, the Court of Appeals correctly held, error “requiring reversal.” Dampier, 233 Mich App 714, 734; quoting, Terhaar v Hoekwater, 182 Mich App 747, 751 (1990) (see: Argument “II”; pp. 18-19, *infra*).

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE RETAINED CONTROL EXCEPTION POSES A SEPARATE, DISCRETE, INDEPENDENT BASIS OF LIABILITY UNDER ESTABLISHED MICHIGAN LAW, AND THAT A GENUINE ISSUE OF MATERIAL FACT REMAINS WHETHER CAPITAL WELDING IS SUBJECT TO LIABILITY UNDER THAT EXCEPTION IN THIS CASE

A. Capital Welding’s Liability

A general contractor may be held liable when it retains control of the work. Johnson v Turner Construction, 198 Mich App 478, 480 (1993). In Funk v General Motors, 392 Mich 91,

this Court stated that where the defendant entrusts work to its contractor, but retains control of at least part of the work, it remains subject to liability for harm to others caused by a failure to exercise such control with reasonable care. While general oversight and safety standards in and of themselves are insufficient to constitute “retained control,” Johnson, 198 Mich App at 480-481; Samodai v Chrysler Corp., 178 Mich App 252, 256 (1989), such control is established if the defendant, under the actual working relationship of the parties involved, exercises control over the actual performance of some aspect of the work. Plummer v Bechtel Construction, 440 Mich 646 (1992); Signs v Detroit Edison, 93 Mich App 626, 638 (1979). “There is no specific test to determine the degree of control sufficient to create an independent duty of care in an owner or general contractor under the doctrine of retained control, and the descriptions are somewhat varied.” Candelaria v BC General Contractors, 236 Mich App 67, 75-76 (1999) (additional citations omitted). The Defendant “must retain at least partial control and direction of the construction work, beyond safety inspection and general oversight.” Burger v Midland Co-Generation Venture, 202 Mich App 310, 317 (1993).

Defendant, Capital Welding, exercised control and had an effect upon the way in which the work was conducted. Compare, Candelaria, 236 Mich App at pp. 77-78. Capital Welding exercised “a high degree of actual control” going well beyond “general oversight or monitoring.” Philips v Mazda Motor Manufacturing, 204 Mich App 401, 408 (1994). Like General Motors in Funk itself, Capital Welding had constant representation at this construction site.

Mr. Stadler, Capital Welding’s field superintendent, stated at deposition, as follows:

1. That he would go out to this job and troubleshoot and “that if there’s a problem, that kind of thing, that’s the reason that I was out there” (C.W. Appx. 322a);
2. Stadler was there when the other accident occurred (C.W. Appx. 327a);

3. Capital Welding had sufficient knowledge, between himself and its owner, Mr. Robinson, to erect a building safely; Stadler was aware of all relevant industry standards (C.W. Appx. 331a);
4. No document absolved Capital Welding of its safety responsibilities (C.W. Appx. 342a);
5. Capital Welding had the authority to throw a contractor off the site for safety reasons (C.W. Appx. 344a);
6. If Stadler felt a crane operator's presence was needed at the site he would call Don Abrey and tell him to get the crane there (C.W. Appx. 361a).
7. Mr. Stadler admitted that he instructed ironworkers with regard to steel fabrication errors and the correction thereof (C.W. Appx. 327a-328a).

Consider Plummer, supra, where Detroit Edison hired the subcontractors, and had a site safety coordinator at the construction zone on a daily basis, whose responsibility was to "observe and report the basic safety operation throughout the project" and "to assure that the safety provisions of the project contracts were performed." 440 Mich at 648-649.

Under Michigan law, "whether a general contractor or a landowner had retained control is a question of fact for the jury." Philips, 204 Mich App at p. 409; Burger, supra, 202 Mich App 310, 317. In Signs v Detroit Edison, the Court of Appeals upheld a finding that the placement of an inspector at the job site, part of whose function was to protect the safety of certain installations, constituted a sufficient degree of control to give rise to a duty to exercise reasonable care. 93 Mich App 626, 642.

The pertinent contract provided that Capital Welding keep the building adequately braced until the structural steel was all tied in (Robinson dep, 41; Appx. 37b). Each bundle of decking on the unwelded bar joists weighed close to 4,000 pounds (Appx. 36b). Plaintiff testified that Capital Welding's supervisory employee, Alex Stadler, instructed him with regard to the fabrication of the lugs out of a piece of angle iron and the welding of them onto the columns

(C.W. Appx. 37a-38a). In Plaintiff's words, "he told me what I needed to do to, you know, rectify the problem." (C.W. Appx. 80a). On this and other problems, Stadler actually directed Plaintiff and other ironworkers concerning the methods of work to be used on this project (C.W. Appx. 80a-82a). The ironworkers would do whatever the superintendent wanted them to do, Plaintiff testified (C.W. Appx. 83a-84a). Mr. Stadler, of Capital Welding, admitted that he instructed ironworkers with regard to steel fabrication errors and the correction thereof (C.W. Appx. 327a-328a).

The record reveals that Capital Welding had the contractual responsibility for safe steel erection practices. It had a common law obligation to use due care in the performance of this contractual undertaking. Clark v Dalman, 379 Mich 251, 261 (1967); Schanz v New Hampshire Insurance, 165 Mich App 395, 402-403 (1988). Capital Welding had the clear responsibility to provide job safety measures. Plummer, supra. In fact, Stadler admitted that he instructed ironworkers with regard to steel fabrication errors, and the correction thereof (C.W. Appx. 327a-328a). Capital Welding played a larger role in this matter than the Circuit Court found, on summary disposition.

The Court of Appeals was right to reverse the Circuit Court's decision on this point. As the Court noted, not only did Plaintiff, in response to Capital Welding's S.D. Motion, submit the contractual documents, but Plaintiff "also introduced other evidence demonstrating that Capital retained control over his work." Ormsby v Capital Welding, Inc., 255 Mich App 165, 186 (2003). The Court did indicate, as an illustration, that on the second day he was employed at the site, Mr. Ormsby had encountered a problem involving columns with missing lugs, the columns having been incorrectly fabricated. Id. Plaintiff's supervisor did not instruct him on how to deal with this problem, but rather, Mr. Stadler, "Capital's project manager," specifically told Plaintiff

what to do about that particular issue. Id. In addition, Plaintiff testified that “if the superintendent on the job tells you they want something done, then you’re pretty much obligated to do that really.” Id.

Capital Welding argues that the Court of Appeals misconstrued the facts when it stated, in conjunction with Stadler’s instructions with regard to the fabrication of lugs, that these instructions related specifically to the occurrence of Plaintiff’s accident and the work Plaintiff was doing at that particular time. Capital Welding cites the following paragraph of the Court of Appeals’ opinion:

“Plaintiff testified that the joists supplied for the job were not manufactured to be bolted, something he had not seen before. Alex Stadler, an employee of Capital and site’s project manager, instructed Plaintiff to fabricate lugs from angle iron to weld to the columns as a substitute. At some point during the execution of this task, Plaintiff stood on a bundle of decking that had been loaded onto the joists. As he stood on the decking, he prepared the joists for welding by spacing them. As he attempted to space a joist by hitting it with a sledge hammer, the joists and decking on which he stood shifted, causing him to fall and sustain injuries. Plaintiff testified that a mason was working ‘right below’ him when the structure collapsed.” [255 Mich App at 169-170].

According to Capital Welding, Plaintiff was not fabricating the lugs at the precise time of the accident (C.W.’s Brief at pp. 24-25).

Plaintiffs respectfully submit that the Capital Welding has misconstrued the Court of Appeals Opinion by taking bits and pieces, and has drawn untoward conclusions therefrom. First of all, Stadler’s lug fabrication instructions are not the sole basis on which the Court of Appeals correctly concluded that the retained control theory has merit as to Capital Welding. That was not a “single isolated incident,” contrary to Capital Welding’s argument (Brief, at p. 25). Capital Welding’s measure of control, through Stadler, went well beyond that particular aspect of the matter. Not only were the joists not fabricated for bolting, Plaintiff testified, but the columns themselves “had to be leaned in order for the tie joists to be able to have something to land on”

(C.W. Appx. 36a-37a). In addition to the “lugs” problem, Mr. Ormsby had to deal with the spacing of the joists, by beating them with a sledgehammer or “beater” (C.W. Appx. 43a). He would “[h]it it with a hammer to straighten it” (C.W. Appx. 45a). Plaintiff’s discussions with Stadler encompassed both problems. Plaintiff had another talk with Stadler on the day before the accident:

“Q. Okay. Tell me about the discussion that you had with this fellow [Stadler] on the 23rd.

“A. Oh, it was basic things about, I mean, there was some problems on the lease side, too. Like, for instance, when they ordered the joists, one of the joists for whatever the reason was, ended up being like so many feet short, like 20 feet short or whatever. I mean, it was way short. And there was some -- there was some other columns that came up underneath to hold windows or something and between where the lugs were on the columns on the beam and the anchor bolts and the footing, something was off. Those columns weren’t going to end up being plumb for whatever reason. I don’t know if it was -- I don’t know -- I don’t remember what was determined to be wrong. I don’t know.” [C.W. Appx. 81a-82a].

Thus, when Ormsby encountered any problem with regard to the specific accomplishment of his work on this job, he spoke to Stadler about it and received direction on how to rectify that problem (Appx. 82a). Indeed, Stadler himself admitted that this was true, and “that if there’s a problem, that kind of thing, that’s the reason that I was out there” (C.W. Appx. 322a). Stadler admitted instructing ironworkers with regard to steel fabrication errors and the correction thereof. Id., 327a-328a.

The second problem with Capital Welding’s argument, in this respect, is that the “retained control” exception’s applicability to a given case does not hinge upon a direct relationship between the specific manner in which that control was actually exercised and the mechanism of the Plaintiff’s injury. In fact, Plummer, supra, establishes that retention of control regarding safety alone may give rise to a duty under the retained control doctrine, and that it is

only necessary that the Defendant exercise control over the actual performance of some aspect of the work. Plummer, 440 Mich 646, 660, fn. 17; see also, Restatement of Torts (2d), § 414, p. 387 (referring to a defendant “who retains the control of any part of the work ...” [emphasis added]). In this case, Capital Welding did, as correctly observed by the Court of Appeals, have “some actual effect on the manner or environment in which the work was performed.” 255 Mich App at 183; quoting, Candelaria, 236 Mich App 67, 76. Moreover, based on Plaintiff’s testimony, a reasonable jury could conclude that Capital Welding’s directions constituted de facto orders which Ormsby and his crew were far from “entirely free” to disregard. Plummer, 440 Mich at 661-662.

Having retained this control, Capital Welding had a duty to prevent unsafe steel erection practices, including the placement of the decking in an unstable fashion onto the joists -- a condition entirely visible to Stadler (C.W. Appx. 96a). It is not true to suggest, as does Capital Welding, that the manner in which Capital Welding retained control is “unrelated to the injury suffered by Plaintiff” (Capital Welding’s Brief, at p. 25). Nor is it true, based on the entire record, which must be considered on a “(C)(10)” motion, that the “alleged ‘control’ consists of a single, isolated prescription for alteration or deviation unrelated to the incident.” Id., p. 18. Rather, in reviewing the Circuit Court’s and Court of Appeals’ decisions herein, the Court will “consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable the party opposing the motion,” namely, Mr. Ormsby. Rose v National Auction Group, 466 Mich 453, 461 (2002). The Circuit Court could not hinge its decision solely on Capital Welding’s proofs, much less the “admissions” (*sic*) of Plaintiff’s employer, Mr. Agray, but was required to examine the entirety of the documentary

proofs.²

General negligence principles also sustain the Court of Appeals' treatment of this issue. Although the general rule in this field is one of nonliability for the negligence of an independent contractor or the latter's employees, Bosak v Hutchinson, 422 Mich 712, 724 (1985), the retained control doctrine reflects this Court's (and the Restatement's, for that matter, Restatement of Torts [2d] at § 414) view that a company which retains control over the work thereby assumes a duty coincident with such control. This is consistent with the more general rule that "those who undertake particular activities or enter into special relationships assume a distinctive duty to procure knowledge and experience regarding that activity, person, or thing." Schultz v Consumers Power Co., 443 Mich 445, 450 (1993). Given the actual "relationship of the parties" to this case, with Mr. Ormsby and his crew taking specific direction with regard to the accomplishment of the work from Stadler (Capital Welding's superintendent on site), the retained control theory is particularly applicable. Schultz, at 450. As this Court stated in Clark v Dalman, 379 Mich 251, 260-261 (1967):

"Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another." [citation omitted].

² Since he is a non-party, Mr. Abray's statements are not "admissions" of any sort, compare, MRE 801(d), much less binding upon Mr. Ormsby (see: Capital Welding's Brief at p. 23).

B. The Exceptions Are Separate and Independent

In disposing of Plaintiffs' Complaint, the Circuit Court stated, that the "retained control" theory has application only with respect to common work areas, citing Candelaria, supra, 236 Mich App 67, 74-75, for this analysis (C.W. Appx. 548a-549a; Opinion and Order; 9/19/00, pp. 2-3). The Court of Appeals reversed the Circuit Court on this point. 255 Mich App 175-185. This Court has granted leave to appeal on this issue (Monarch Appx., 201a-202a).

First of all, that particular statement in Candelaria must be considered *dicta*, because it was unnecessary to that decision. Mr. Candelaria offered no evidence whatsoever that the defendant had retained control over the performance of the work. 236 Mich App 67, 77-78. Whether the incident occurred in a common work area was "not the basis for BC's motion for a directed verdict." Id., 77. "[S]tatements concerning a principle of law not essential to determination of the case are *obiter dictum* and lack the force of an adjudication. McNally v Wayne County Canvassers, 316 Mich 551 [1947]." Roberts v Auto-Owners Insurance Co., 422 Mich 594, 597-598 (1985).

Secondly, Plaintiff offers the following analysis, which shows that the statement in Candelaria, that the retained control theory applies only in common work areas, is mistaken, whether *dicta* or not.³

First of all, neither Defendant urges the correctness of the Circuit Court's conclusion that a common work area is a required element of the retained control exception, a decision which thereby deleted the "retained control" theory as an independent basis of liability. In fact, Defendant Monarch repeatedly and vociferously urges the separate and distinct quality of the two doctrines, the "dichotomy" represented by these two exceptions, and so forth (Monarch's

³ Plaintiff also incorporates the Court of Appeals' discussion of this same issue by reference (Defendants' Exh. 1; C/A Opinion, pp. 6-10; C.W. Appx. 560a-564a).

Brief, pp. 19, et. seq.). Beginning with Funk itself, and continuing with previous and subsequent decisions, Monarch notes that the retained control theory even preexisted Funk, and is based specifically upon section 414 of the Second Restatement of Torts, which provides:

“One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.” [Monarch’s Brief, at pp. 19-20].

As Monarch notes, the retained control and common work area rules “have differing origins, and although they appear together on numerous occasions, they should not be considered conjoined doctrines. Each may operate separately and distinctly from the other” (Monarch’s Brief, at p. 24). Thus, “retained control is a wholly separate and distinct doctrine.” Id., 25. It was only the incorrect decision in Candelaria, supra which “blur[red] the distinction between” the two (Monarch’s Brief at p. 23).

Note also that Defendant, Capital Welding, refers to the common work area exception as a “second prong of the Funk analysis,” and treats it as a separate exception to the general rule of non-liability (Capital Welding’s Brief, at p. 10).

This concession by the defense is a wise one, given the clear separation between the origins and rationales of the two exceptions. Candelaria is incorrect, for this and other reasons.

First of all, none of the cases cited in Candelaria for this proposition contains such a holding. Candelaria, 236 Mich App 67, 74-75; citing, Groncki v Detroit Edison, 453 Mich 644 (1996); Hughes v PMG Building, 227 Mich App 1, 5-6 (1997); Samhoun v Greenfield Construction, 163 Mich App 34, 45-46 (1987); Erickson v Pure Oil Corp., 72 Mich App 330, 336 (1976). Candelaria’s reference to Funk itself suffers from the same deficiency. Candelaria, 236 Mich App at 75; quoting, Funk, 392 Mich at p. 104. Rather, the quoted discussion, from

Funk, is of the “common work area” concept, and does not restrict the retained control theory to common work areas.

A reading of the complete majority opinion in Funk itself shows that this Court therein recognized and established two, independent, discrete exceptions to the general rule of non-liability on the part of the general contractor. This Court in Funk discussed the two issues separately, giving no indication whatsoever that a “common work area” is a *sine qua non* to the imposition of liability under the “retained control” concept. See, Funk, *supra*.

Established Michigan law is to the contrary of Capital Welding’s argument. In Johnson v Turner Construction, *supra*, for example, the Court of Appeals stated that the general contractor’s duty with respect to common work areas holds “true regardless of the amount of control of the general contractor retained because inherent in the general contractor-subcontractor relationship is the general contractor’s supervisory and coordinating authority wherein ultimate responsibility for job safety in common work areas is placed. Funk, *supra*, p. 104; Erickson v Pure Oil Corp., 72 Mich App 330, 335[.]” 198 Mich App 478, 480, fn. 1. In Johnson v Turner Construction, the Court of Appeals stated as follows:

“However, a general contractor may be held liable when it retains control of the work. [Signs, *supra*], p. 638. Furthermore, a general contractor may be found liable if it fails reasonably to guard against readily observable, avoidable dangers in the common work areas that create a high degree of risk to a number of workers.”

Johnson v Turner Construction, 198 Mich App at p. 480; citing, Plummer, *supra*; Funk, *supra*.

Obviously, the use of the word “furthermore” by the Johnson v Turner Construction panel signifies that the one theory is “in addition to” the other. Webster’s Seventh New Collegiate Dictionary, at p. 339 (1970 ed.).

Likewise, in Plummer, the lead opinion of Justice Levin, the author of Funk itself, contains separate, independent discussions of the “retained control” and common work area theories and their applicability to the facts at hand. 440 Mich 646, 659, et. seq., 666.

The Candelaria dictum must be viewed as especially inaccurate upon consideration of Signs, supra, where the Court sustained a judgment for the plaintiff based upon the “retained control” doctrine even though the Court also held that there was no common work area! 93 Mich App 626, 634-635, 639-642; see also, Philips v Mazda Motor, supra, 204 Mich App 401, 406-408 (discussing the two theories in independent, separate fashion).

It is certainly true that both exceptions have, as their general purpose, the fostering of workplace safety. See, Funk, 392 Mich 91, 102-103. And it is also true that General Motors was found to be potentially liable in Funk not only on the basis of the common work area doctrine initiated therein, but also because it exercised a high degree of control over the actual work on the project. 392 Mich at 105-108. Nevertheless, this Court separately regarded it “to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen.” 392 Mich 91, 104. One form of liability did not hinge upon the applicability of the other, or vice versa. See also, Hardy v Monsanto Enviro-Chem Systems, 414 Mich 29, 63-65. As noted by Justice Moody, in one of the controlling portions of his opinion in Hardy:

“It is to be noted that in Funk, supra, 104, fn. 6, we stated that the analysis applied to a general contractor is not necessarily applicable where an injured employee of one subcontractor seeks to impose liability upon another subcontractor.

“This is not to say, however, that in cases where a subcontractor is functioning in the capacity of a general contractor and is, for example, exercising authority over another subcontractor’s work or over a common work area, the common-law duty

recognized in Funk would not apply. See, e.g., Federal Cement Tile Co. v Henning, 32 F2d 163 (CA 8, 1929).

“While J&L subcontracted the sheet-metal work to Mr. Hardy’s employer and there was testimony, which, if accepted by the jury, would indicate that J&L directed Mr. Hardy and his co-employees to change their work station, Plaintiff has not specifically advanced the theory in her Brief that J&L was thereby functioning as a general contractor. In any event, we need not resolve the question.”

414 Mich 29, 69-70, fn. 41.

In this case, Capital Welding exercised control over Abrey’s work. More to the point, the use of the word “or” in the above footnote indicates the separateness of the two exceptions, obviously.⁴

The record supports application of the “retained control” concept to Capital Welding. This is true, regardless of whether Mr. Ormsby’s injury occurred in a common work area. What does the retention of control (with the consequent potential of liability) have to do with whether the control is exercised in a common or an un-common work area? One theory is obviously independent of the other. Any statement to the contrary in Candelaria is pure *dictum*, and absolutely wrong, being contrary to all other Michigan cases on point. It would make no sense to have a “retained control” theory at all, if it only applied in a “common work area” where the general contractor already has, by definition, a positive legal duty. Plummer, supra; Funk, supra; Johnson, supra.

This is not to say that Plaintiffs agree that Mr. Ormsby did not fall in a common work area. The record supports Plaintiffs’ claim and the Court of Appeals’ determination that Mr. Ormsby did fall in a common work area (Argument “II”, *infra*).

⁴ It has never been Plaintiffs’ contention, and Plaintiffs did not urge in response to Capital Welding’s s.d. motion, that Capital Welding is liable “qua” general contractor (see: Argument “III”, *infra*). Hardy, supra.

II. THE COURT OF APPEALS' DECISION ALSO REPRESENTS A CORRECT APPLICATION OF THE COMMON WORK AREA THEORY, AGAINST THE DEFENDANT GENERAL CONTRACTOR, MONARCH; OR AT LEAST A REASONABLE TRIER OF FACT COULD SO CONCLUDE

Not only Abray's personnel, but various employees of different subcontractors would be or had been working in the same area where Mr. Ormsby fell. Mr. Ormsby testified that a worker employed by a masonry subcontractor was just below at the very time of this accident. The failure to observe safe erection procedures endangered the lives of not only Abray employees, but of anyone who might be walking on the job site. See also, the deposition testimony of Mr. Mendenhall, covering the involvement of the various subcontractors (C.W. Appx. 182-186a).

The general contractor has responsibility under Michigan law to provide safety equipment and implement safety procedures, or require subcontractors to provide such equipment or programs in common work areas. Hardy v Monsanto, 414 Mich 29, 69-7(1982); Funk v General Motors, 392 Mich 91, 103-104. It is a common misconception that employees of several different contractors must occupy the same precise area at the same precise time in order for the "common work" theory to apply. In fact, under current Michigan law, "it is not necessary that other subcontractors be working on the same site at the same time; the common work area rule merely requires that employees of two or more subcontractors eventually work in the area. Philips v Mazda[, supra], 204 Mich App 401, 408[;] Erickson v Pure Oil Corp., supra, 72 Mich App 330, 337[.]" Hughes v PMG Building, Inc., 227 Mich App 1, 6 (1997); Johnson v Turner Construction, 198 Mich App 478, 481.

As it so happens, Mr. Ormsby has testified that there was a masonry subcontractor's employee just below at the time of his mishap. In addition, there is Mendenhall's testimony

concerning the arrival at the site at a later time of other subcontractors. In Erickson v Pure Oil Corp., supra, 72 Mich App 330, a case cited with approval by this Court in Groncki v Detroit Edison, 453 Mich 644, the plaintiff was the only person on the slippery roof when he fell. The Court of Appeals nevertheless concluded that a reasonable jury might find a common work area, because other trades would be involved in the completion of the building. 72 Mich App 330 at p. 337.

This structure “did not exist in isolation.” Plummer, 440 Mich 646, 667. As this Court explained in Plummer, the “common work area” concept does not contemplate a “quiltwork of common and non-common work areas -- this 50 or 100 square feet suspended in the air being a common work area and an adjoining 50 or 100 square feet not being a common work area.” 440 Mich at pp. 667-668. Instead:

“The common work area formulation sought to distinguish between a case where it was appropriate to impose overall safety responsibility on the general contractor and one where it would not be appropriate. It does not depend on a matter of five, ten or fifteen feet, or who erected this platform, or whether an employee or another subcontractor was on this platform before Plummer. Indeed, workers were probably on the platform when it was first erected, with guardrails.”

“We conclude that there was sufficient evidence to justify the jury’s verdict that the catwalk/platform system from which Plummer fell, constituted a common work area.” Id. (emphasis added).

The same is true with regard to the area occupied by the structural steel from which Mr. Ormsby plummeted. Other subcontractors had been there previously, and would be later as well. This is not a case in which Ormsby’s employer “was the only subcontractor working for [Monarch] on the project.” Candelaria, 236 Mich App 67, 77. In this case, as in Groncki, 453 Mich 644, 663, “a question of fact exists regarding the presence of a common work area.”

The Circuit Court concluded that this could not be a common work area, because there was “no evidence that other subcontractors would work on the erection of the steel structure.”

(Monarch's Exh. 3; Opinion and Order of 9/19/00, at p. 2; C.W. Appx. 548a). This particular analysis by the Circuit Judge shows utter confusion as to the "common work area" rule and its proper application. Not every other contractor or even any other contractor on the project would be doing the same work that this subcontractor (Plaintiff's employer) would be doing on this project. It is not the commonality of the work, but the commonality of the area where the work is to be performed by the various subcontractors, which gives rise to application of the common work area theory. In fact, by definition a "common work" area involves more than one kind of "work", i.e., the work of employees of multiple subcontractors.

Monarch urges that the Court of Appeals did not say enough about the "common work area" theory's applicability, but only addressed the "commonality" of the area without addressing the other, necessary elements. In fact, the other, necessary elements are satisfied on this record, but the Court of Appeals did not err in its treatment of this issue. Contrary to Monarch's argument, the Circuit Court did not dispose of this theory for any reason other than the incorrect notion that "there is no evidence that other subcontractors would work on the erection of the steel structure" (C.W. Appx. 548a). Although the Circuit Court recited the other elements, there was no analysis thereof. Id. The Circuit Court rejected the theory only because it did not appear on the complaint (at that time), and for supposed lack of proof of that single element. Id. In these circumstances, it was certainly appropriate, and within the Court of Appeals' discretion, to conclude that "the dispositive factor addressed by the trial court was whether the evidence showed that Plaintiff was injured in a common work area," and to limit its discussion and decision to that particular question, because it was the only one dealt with below. Ormsby, 255 Mich App at 187-188.

Note that Monarch, the only Defendant affected by this issue, *sub silentio* concedes the commonality of this work area by not even addressing that point. This Court should affirm, for the above reasons alone, on this issue.⁵

Aside from the procedural point, Monarch's argument lacks merit, because the proofs sustain the existence of a genuine issue of material fact on each of the "common work area" elements.

Under Michigan law, a general contractor is legally responsible to implement safety procedures, in common work areas. Hardy, supra, 414 Mich 29, 69-70; Funk v General Motors, 392 Mich 91, 103-104. In Funk, the Court stated:

"We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen." [392 Mich at p. 104].

In his lead opinion in Groncki, Chief Justice Brickley distilled four elements comprising the common work area theory:

1. A general contractor with supervisory and coordinating authority over the job site;
2. A common work area shared by the employees of more than one subcontractor;
3. A readily observable and avoidable danger in that common work area; and
4. Creating a high degree of risk to a significant number of workers [453 Mich 644, 662].

⁵ This is not to say that Monarch could not bring another motion, on remand, addressing the other elements of the "common work area" theory. But that would be a matter for the Circuit Court's resolution, per the Court of Appeals' remand order.

In this case, there is no contest over Plaintiffs' satisfaction of the first and second of these elements. Monarch does not deny its status as a general contractor with such authority. Nor does it attack the Court of Appeals' reversal of the Circuit Court's conclusion that this was, "in a purely geographical sense, at least, a "common work area shared by the employees of more than one subcontractor." Groncki, supra.

Rather, Monarch focuses on the last two elements, and defends the correctness of the Circuit Court's dismissal order on that basis, even though the Circuit Court never addressed those particular elements.

There was a readily observable danger to a significant number of workers posed by the stacking of the decking on the joists, in an entirely unsecure fashion. That is the genesis of the entire case. This danger was readily observable, as it was characteristic of the practices on this work site in two separate regions of the construction zone (C.W. Appx. 33a-35a), a fact noted in Capital Welding's Brief (at p. 25). There was nothing hidden about this condition (Appx. 38b [Robinson]; C.W. Appx. 96a). Stadler himself testified that he was there when the bar joists were placed on the roof area, and that they were readily observable to anyone who would climb up a ladder and look (C.W. Appx., 328a-329a). Stadler, in his daily rounds, often went up that ladder to see what was going on up top of the building. Id., 329a-331a. This dangerous condition created a high degree of risk to a significant number of workers, including Plaintiff, the other members of his crew, and those who might be working below, in this common work area, including the mason observed by Plaintiff at the very moment of his accident. As in Groncki, therefore (more particularly, as in the companion case to Groncki of Bohnert v Carrington Homes), questions of fact remain concerning the applicability of the common work area theory.

453 Mich 644, 662-665.⁶

As the record contains sufficient evidence for a reasonable jury to conclude that it was a common work area where Mr. Ormsby fell and was injured, it follows as a matter of law that the Circuit Court reversibly erred by denying Plaintiffs' motion to amend his Complaint to so allege (C/A Opinion, p. 12; C.W. Appx. 566a). The only ground cited by the Circuit Court for denying the amendment was consistency with its prior ruling (on the Capital Welding Motion), i.e., futility. Therefore, "unless amendment of the Complaint would have been futile, the trial court's denial of Plaintiffs' Motion was error requiring reversal." Dampier v Wayne County, *supra*, 233 Mich App 714, 735. "A motion to amend ordinarily should be granted" unless a specific reason for denying it exists. Sands Appliance Services v Wilson, 463 Mich 231, 239-240 (2000). There would have been no prejudice to the defense from allowing the amendment, since the matter was already fully briefed. See also, Fyke & Sons v Gunter Co., 390 Mich 649 (1973); Coffey v State Farm, 183 Mich App 723, 727 (1990). Especially is this true here, where the amendment is based upon the same factual underpinnings which gave rise to the original pleadings, and briefs already on file. LaBar v Cooper, 376 Mich 401 (1965). The pendency of the s.d. motion, and even the grant of same to Capital Welding, did not preclude the amendment. MCR 2.116(I)(5); Feliciano v Dept. of Natural Resources, 158 Mich App 497, 500-501 (1987). Leave shall be freely given when justice requires. MCR 2.118(A)(2); Stanke v State Farm, 200 Mich App 307, 321 (1993).

⁶ Note that Justices Mallot and Cavanagh concurred in this portion of Chief Justice Brickley's lead opinion in Groncki, while Justice Boyle concurred in the result, with Justice Levin dissenting only on the separate issue of Edison's duty as a power company. 453 Mich at pp. 665, 674, 679.

III. PLAINTIFFS HAVE NO QUARREL WITH THE NOTION THAT THE "COMMON WORK AREA" THEORY APPLIES SOLELY TO GENERAL CONTRACTORS AND OTHERS ACTING AS GENERAL CONTRACTORS; THE COURT OF APPEALS DID NOT APPLY THE COMMON WORK AREA PRINCIPLE TO CAPITAL WELDING IN THIS CASE

Plaintiffs do not read the Court of Appeals' opinion as allowing imposition of liability upon Capital Welding under the common work area principle. The Court of Appeals' order of reversal on that theory relates solely to the general contractor. This is only natural and proper, given that it is the general contractor's, Monarch's, responsibility to react to dangers in common work areas. Funk v General Motors, 392 Mich at p. 104; Johnson v Turner Construction, 198 Mich App 478, 480, incl. fn. 1. The Court of Appeals mentioned Capital Welding in this connection only because the Circuit Court had incorrectly added the "common work area" concept to the necessary elements of Plaintiffs' retained control claim against Capital Welding (ante, Argument "I"; C.W. Appx. 548a-549a). 255 Mich App 165, 176, 188. Plaintiffs do not contend that the common work area rule applies to entities other than general contractors, and owners or other companies functioning as general contractors. See, Hardy v Monsanto Enviro-Chem Systems, 414 Mich 29, 69-70, fn. 41.

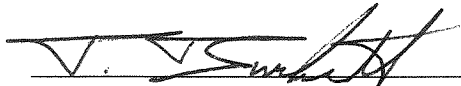
RELIEF

For the reasons stated in this Brief, Plaintiffs-Appellees, Ralph and Kimberly Ormsby, respectfully ask this Honorable Court to affirm the Court of Appeals' decision.

Respectfully submitted,

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Dated: 1/21/04

STATE OF MICHIGAN
IN THE SUPREME COURT

(On Appeal From the Michigan Court of Appeals)

RALPH ORMSBY and KIMBERLY ORMSBY,

Plaintiffs-Appellees,

vs.

CAPITAL WELDING, INC., an Ohio
Corporation, and MONARCH BUILDING
SERVICES, INC., an Ohio corporation,

Defendants-Appellants.

Supreme Court Nos. 123287; 123289

Court of Appeals No. 233563
(Hon. Kirsten F. Kelly;
Kathleen Jansen; Pat M. Donofrio)

Oakland Circuit No. 98-008608-NO
Hon. Alice L. Gilbert

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

SHARON THRASHER, being first duly sworn, deposes and says that on the 21st day of January, 2004, she served two copies each of PLAINTIFFS-APPELLEES' BRIEF ON APPEAL, AND APPELLEES' APPENDIX upon the following:

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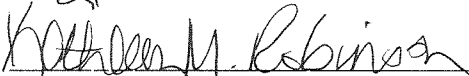
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by placing said copies in an envelope properly addressed and depositing said envelope in the U.S. mail located at Southfield, Michigan.

Further, Deponent sayeth not.


SHARON THRASHER

Subscribed and sworn to before me,
this 21st day of January, 2004.



NOTARY PUBLIC

KATHLEEN M. ROBINSON
Notary Public, Wayne County, Michigan
Acting in Oakland County, Michigan
My Commission Expires October 20, 2006